Residential Sales on Native Lands in Interior BC

Presented by: Peter D. Borszcz

The following information is general in nature and cannot be construed as legal advice on for any specific individual or transaction.

Updated March 2014
Can you see a difference?

$264,900
2158 Michele Crescent, Westbank

$419,000
1634 Scott Crescent, West Kelowna
Can you see a difference?

2 bed, 2 bath
$219,900
#105 - 3229 Skyview Lane, Westbank

2 bed, 2 bath
$255,900
#2411 - 3843 Brown Road, West Kelowna
Key Issues:

1. What am I buying?
2. What kind of lease is it?
3. Who is the Landlord?
4. What is the term?
5. Does the lease allow rental increases?
6. Is the lease entirely prepaid?
7. Other financial obligations under the lease?
8. Does the leases allow for assigning or mortgaging of purchaser’s interests?
9. Are the no defaults on the existing lease?
10. What are the insurance requirements?
11. Is there provisions of an owner’s association, how is the common property administered?
Freehold v. Leasehold

Most clients don’t understand the difference:

- 2/5 Home Buyers in the UK did not know the difference between Freehold and Leasehold.

- 1/10 Home Buyers in the UK thought “leasehold” meant that the property could be rented to tenants.

- 1/10 Home Buyers in the UK thought that “freehold” meant that the property was exempt from capital gains tax.
Freehold v. Leasehold

**Freehold**: an estate in land held in fee simple, being the broadest interest in land allowed by law, endures until the currently hold dies without heirs, and is subject only to Crown reservations.

**Leasehold**: a tenants possessory estate in land and defined by time, periodic or absolute.
Aboriginal Title

Differs from fee simple as:

1. Inalienable (except to Crown)
2. Collective interest held by community
3. Based on prior exclusive occupation
4. Includes right to use both land and minerals (subject to limitations)
5. Includes a right of consultation
Seven Local Bands:
- Upper Nicola Indian Band (Merritt)
- Okanagan Indian Band (Vernon)
- Westbank First Nation
  **** Self Government ***
- Penticton Indian Band
- Osoyoos Indian Band
- Upper Similkameen Indian Band (Keremeos)
- Lower Similkameen Indian Band (Hedley)

More information: [www.okanaganfirstpeoples.ca](http://www.okanaganfirstpeoples.ca)
Land Administration on Reserves

A. Treaty Lands – Lands owned in fee simple, Band self governs and administers its own land registry and land title system (ie; Nisga’a, L’heidli, Maa-nulth, Tsawwassen).

B. Self-Government – Federal government holds title, but band has expansive powers to administer and manage lands. Transaction are registered at a Ottawa maintained registry call the Self Government First Nations Lands Registry. (eg; Westbank, Sechelt).

C. Administration under Indian Act - Bands that do not fall under A or B are administered by the Indian Act. Lands are registered at the Indian Lands Registry in Ottawa and transfers are subject to ministry approval.
Problems....

The Standard Contract of Purchase and Sale does not address:

1) conveyance of a leasehold interest (WFN and INAC)
2) validity of lease (WFN and INAC)
3) requirement for 3rd party approval (~WFN and INAC)
4) delayed or escrow payment of purchase price (INAC)
5) delayed Completion Date to match registration (INAC)
6) unique registry systems (WFN and INAC)
7) clearing of leasehold encumbrances (WFN and INAC)
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The New INAC Contract..

The INAC Contract should only be used for:

1. Lands within a “reserve” (as defined in the Indian Act);
2. Lands administered in Indian and Northern Affairs Canada (“INAC”) under the Indian Act; and,
3. Land subject to the Indian Lands Registry.

In the OMREB area: the new CBA-REC Contract can be used for all bands **EXCEPT WESTBANK FIRST NATION.**
INAC Contract – Key Points

1. Provides for Conveyance of a LEASEHOLD INTEREST (Attach Lease!);
2. Provides that property rights are subject to limitations in LEASE (recommend ILA);
3. Considers that a Homeowner’s Association Interest may be present;
4. THIRD PARTY APPROVAL (INAC) is a True Condition Precedent (90 days)
   1. Trust Completion: is the date money is deposited with lawyer “in trust” and all papers (including irrevocable directions) are signed;
   2. After the Trust Completion Date, the buyer has 90 days to a) obtain INAC consent and b) register transfer in ILR;
   3. Upon registration, the Buyer’s lawyer then provides the Seller’s lawyer with the Purchase Price;

Realtors should be able to explain that this delay is to allow for INAC approval of documents.
INAC Contract

Why do we need 90 days to get REGISTRATION on the ILRS?

1. INAC usually needs to approve;

2. Unlike LTO, intervening charges on title need to be searched;

3. Priority Issues with Lenders needs to be sorted out (delay can causes issues with mortgage registration)

4. If your application in defective, all documents are returned and need to be resubmitted in a NEW APPLICATION
What does this mean...

For Possession?

Possession can be done on the TRUST COMPLETION DAY if:

a) All parties have signed irrevocable directions to proceed...

b) There is an interim tenancy agreement in place...

c) All buyer’s own funds are in trust...

d) There is an “interest adjustment” or “rent” for the trust period..

e) Title insurance may be an option...

Note: if Seller is buying another property, bridge financing is likely needed.
The INAC Registration Manual has unique rules on the execution of documents which purport to transfer an interest in land. These rules have been applied by the CBA/REC to the execution of the new contract:

1. Where the client is ILLITERATE or suffers a similar handicap, there must be an accompanying affidavit stating that the client understands what they are signing;

2. Where the client is signing by POWER OF ATTORNEY, a *certified copy* of the power of attorney must be available for registration;

3. Where a CORPORATION is signing either:
   1. the corporate seal must be affixed to the document; or,
   2. The statement “I have authority to bind the corporation” must appear.
WFN Contract – WHY?

Realtors been selling WFN lands for years.... (Bassett Amendment)

But now the standard of practice in the INAC contract is not followed:
1) the form of lease is not attached
2) freehold undertakings and delivery provisions
3) third party approvals not addressed
4) freehold title clearance requirements

But... INAC Contract did not consider WFN’s unique self gov’t land regime.

**And use of a Freehold Contract on WFN Lands would be a breach of a Realtors standard of care.
Key Points:

1. The sale of a **LEASEHOLD** interest is identified and limits the rights sold under the contract to only those property rights under the lease.

2. The sale includes any interest (ie; share) of the Seller in any **HOMEOWNER ORGANIZATION** or association (similar to a “strata council”).

3. Lease to be **ATTACHED** as schedule “A”. Lease can be obtained from WFN Registry, or your local lawyer (ILA recommended)...

Realtors should explain to their client that there are buying a leasehold interest and the rights of the **SELLER** as defined by the **LEASE**.
3. **THIRD PARTY APPROVAL**: If the approval of a third party is required under the terms of the Lease as a condition to the sale of the Leasehold Interest, then this Contract shall be subject to such approval being obtained on or before the Completion Date (defined below). This is a true condition precedent for the benefit of the Seller and the Buyer and may not be waived by either or both parties. If this condition is not satisfied on or before the Completion Date, then this Contract shall be null and void and the Deposit and all other monies paid by the Buyer on account of the Purchase Price shall be dealt with according to the provisions of the *Real Estate Services Act*.

Key Points:

1. Third Party Approval for WFN is not the same as INAC, and generally the Lawyers have always dealt with this “behind the scenes”.

2. Transfers of some older WFN leases require consent of the Lessor (Locatee); Most of the newer WFN leases do not require approval.

3. As with the INAC contract, an true condition precedent which MUST be fulfilled by the Completion Date.

4. In the past, there has not been an issue, however, this is a ‘just in case’ clause for WFN.

Realtors should inform clients that sometimes consent is required, and in the very unlikely event no consent is given, this will void the contract.
WFN Completion Dates

6. **COMPLETION**: The sale will be completed on ________________, yr. ______ (“Completion Date”) at the Register of Westbank Lands, established by the Government of Canada (the “Registry”).

Key Points:

1. No TRUST Completion on WFN lands (same day paper registry)
2. More certainty for parties (as compared with INAC administered lands)
3. Key difference between INAC contract and WFN Contract
Executive Summary

1. A leasehold interest differs from a freehold interest because it is limited by time and the additional obligations of lessee in the lease.

2. Native lands are held by leasehold interest because they are inalienable, except to the Crown. Long term leases are used to give property rights in native lands to non-natives.

3. Ensure clients know they are buying a LEASE, the lease should be attached in all cases to your contract.

4. On Okanagan Band Lands and other INAC administered Lands, use the new CBA Native Lands Contract. The trust completion provisions allows for the “escrowed” sale of a leasehold interest in INAC lands.

5. On WFN Lands, use the WFN Contract developed by Peter Borszcz and Barry Porrelli, which incorporates the standard of practice of the INAC contract and modifies it to suit the Self-Government regime of WFN.
Acknowledgements
Thank you for listening...

- Questions are always welcome...
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